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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1060

CHICAGO AUTOMOBILE TRADE ASSOCIATION, ET AL., PETITIONERS

v.

ROSS M. MADDEN, REGIONAL DIRECTOR, THIRTEENTH REGION, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 23–28) is reported at 328 F. 2d 766. The decision of the district court (Pet. 30–38) is reported at 215 F. Supp. 828.

JURISDICTION

The judgment (Pet. 29) of the court of appeals was entered on February 18, 1964, and petitioners' application for rehearing (Pet. 39–45) was denied on April 4, 1964 (Pet. 2). The petition for a writ of certiorari was filed on May 2, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the agency's designation of a new Trial Examiner to complete an unfair labor practice case may be reviewed in an independent suit in the federal district court where the statute provides for review in the court of appeals after a final order has been entered.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), and the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, *et seq.*) are set forth in the petition (Pet. 46–48) and in the Appendix, *infra*, pp. 10–11. The relevant provisions of the Board's rules and regulations are set forth in the Appendix, *infra*, p. 11.

STATEMENT

The underlying facts, as they appear from the pleadings and exhibits in the district court, are as follows:

In the summer of 1962, the Board's Regional Director issued complaints alleging that petitioners had committed unfair labor practices in violation of the National Labor Relations Act (B.A. 13–80).[1] The complaints were consolidated for hearing, which commenced on July 30, 1962, before Trial Examiner Arthur E. Reyman (B.A. 4–6). However, on December 12, 1962, the Trial Examiner adjourned the hearing *sine die* on the ground that the nature of the consolidated proceedings had become such that he

[1] "B.A." refers to the separate appendix to the Board's brief in the court below and filed with the petition.

could not "physically keep up with it" and on the "basis of his personal health" (B.A. 5, 82–83).

On January 7, 1963, the Board's Chief Trial Examiner, George Bokat, wrote petitioners that he had received the Trial Examiner's "notice of disqualification, as provided in Section 102.37 of the Board's Rules and Regulations."[2] Bokat enclosed a copy of the notice, wherein Reyman indicated that he was "deeming [himself] to be disqualified to further continue as Trial Examiner for reasons concerning [his] personal health, as reflected by stenographic transcript of the proceedings of December 12, 1962, pp. 1702–1704." Bokat, therefore, informed the parties that he would designate another Trial Examiner and that a trial *de novo* would commence on the consolidated cases on January 15, 1963 (B.A. 5–6, 9, 84–88).[3]

On January 9, Frederick W. Turner, Jr., petitioners' counsel, wrote Chief Trial Examiner Bokat requesting that he reconsider his designation of another Trial Examiner, and his scheduling of a hearing *de novo* on the consolidated cases (B.A. 6, 88–91). After receiving Turner's letter, Bokat discussed with

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[2] Section 102.37 (29 C.F.R. 102.37), *infra*, p. 11, incorporates Section 7(a) of the Administrative Procedure Act (5 U.S.C. 1006(a)), *infra*, p. 10, which provides that a hearing "officer may at any time withdraw if he deems himself disqualified * * *."

[3] The Board's rules delegate to the Chief Trial Examiner the Board's statutory authority (Section 10(b) of the Act, *infra*, p. 10) to designate Trial Examiners to conduct hearings, including the authority to designate a Trial Examiner "to take the place of the trial examiner previously designated to conduct the hearing" (Section 102.34, 29 C.F.R. 102.34, *infra*, p. 11).

Reyman the possibility of the latter's return to conclude the hearing (B.A. 84, 94). On January 11, at Bokat's suggestion, Reyman went to his doctor for a medical opinion. The doctor found that Reyman "has elevated blood pressure (essential hypertension); and [that his] blood pressure was considerably elevated." (B.A. 95, 97). The doctor therefore advised him not to undertake work on the Chicago Automobile Trade Association case (B.A. 97). As a result of this report, Reyman decided to adhere to his withdrawal from the case (B.A. 84, 94–96).

On January 15, Counsel Turner wrote Bokat reiterating petitioners' opposition to a trial *de novo* before a new Trial Examiner (B.A. 6, 91–93). On January 16, Bokat replied. He again explained to Turner why Reyman could not resume the hearing, and told him of the results of Reyman's medical examination. Bokat added that he had assumed, on the basis of their earlier telephone conversations, that "because of the credibility problems [which] were involved, a hearing before a new Trial Examiner would have to be de novo and is what [petitioners] desired." However, Bokat concluded that the question of the scope of the new hearing was "something that can be explored by the Trial Examiner and resolved with the cooperation of the parties at the opening of the hearing on January 21, 1963." (B.A. 93–94.)

On January 18, petitioners filed suit in the district court against the Board's Regional Director, Chief Trial Examiner Bokat, an unnamed Trial Examiner, and three Board attorneys assigned to the Board's Thirteenth Region (B.A. 3–5). The complaint al-

legal that, as Trial Examiner Reyman was currently hearing other Board cases,[4] he was not "unavailable" within the meaning of Section 5(c) of the Administrative Procedure Act (5 U.S.C. 1004(c))[5], and that thus the designation of another Trial Examiner to take over the unfair labor practice hearing violated that section (B.A. 7). Petitioners sought injunctive relief requiring the redesignation of Reyman to complete the Board hearing (B.A. 7-8, 11-12). The Board moved to dismiss the complaint, or, in the alternative, for summary judgment, on the ground, *inter alia*, that the district court lacked jurisdiction over the subject matter (B.A. 12-13).

On April 11, 1963, the district court granted the injunctive relief and denied the Board's motion to dismiss the complaint or for summary judgment (Pet. 30-38). On February 18, 1964, the court of appeals reversed the district court, concluding that it lacked jurisdiction over the subject matter of the action. The court of appeals, finding that the statutory review procedure provided an adequate means whereby petitioners could have their contentions reviewed in the court of appeals, held, on the authority of *Myers* v.

[4] In an affidavit filed in support of the Board's motion to dismiss the complaint, or for summary judgment, Chief Trial Examiner Bokat stated that he had "sought to select 'cases' [for assignment to Reyman] which will not be long and factually complex, and which do not appear to have the potential for generating tension or a 'charged atmosphere' among the participants" (B.A. 84-85, 94-95).

[5] This provision (Pet. 46) states that the "same officers who preside at the reception of the evidence pursuant to section 7 shall make the recommended or initial decision required by section 8 except where such officers become unavailable to the agency."

Bethlehem Shipbuilding Corporation, 303 U.S. 41, that that procedure could not be circumvented by a district court suit (Pet. 23–28).

ARGUMENT

The decision of the court below is correct and in accord with settled authority. No issue warranting review by this Court is presented.

1. Petitioners' basic contention is that the Board, by removing Trial Examiner Reyman from the hearing of their case, authorized a violation of the requirement of Section 5(c) of the Administrative Procedure Act that the same officer who hears the evidence shall make the initial decision; the exception, petitioners say, is inapplicable because an examiner who can hear other cases is not "unavailable to the agency" (Pet. 16).

The National Labor Relations Act provides a procedure whereby a contention such as this may be adjudicated. Petitioners may challenge the propriety of the designation of a new Trial Examiner at the time the hearing recommences. At that time, the Board, if it accepts their contention, may order a new hearing. Only if the Board rejects the contention, allows the original hearing to proceed, and ultimately issues an unfair labor practice order, will petitioners be adversely affected, and in that event they may raise the present issue again in the court of appeals on review of that order under Section 10 (e) or (f) of the Act (set forth at Pet. 46–48). Since petitioners incur no legal liability while pursuing this course, settled principles require that the procedure be exhausted and that it not be circumvented by an independent

equity suit in the district court. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Newport News Co.* v. *Schauffler*, 303 U.S. 54; *Vapor Blast Mfg. Co.* v. *Madden*, 280 F. 2d 205 (C.A. 7), certiorari denied, 364 U.S. 910.[6] See also, *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535; *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540.

Nor is a departure from these principles warranted merely because petitioners have alleged a violation of the Administrative Procedure Act (see Pet. 16–17). As this Court has stated, the APA "purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review." *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499–500. Moreover, Section 10(c) of the APA (5 U.S.C. 1009(c), *infra*, p. 11) expressly provides that preliminary and procedural rulings, such as those involved in this case, are reviewable only when the final agency action is reviewed.

2. *Leedom* v. *Kyne*, 358 U.S. 184, relied on by petitioners (Pet. 17–20), has no application to the instant case. As the court of appeals noted (Pet. 27–28), in *Kyne* the challenged Board action arose in a representation proceeding and "in the absence

[6] It was by exhaustion of the statutory review procedure that adherence to the requirements of the Administrative Procedure Act respecting the substitution of Trial Examiners has been raised in other cases. See *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 971 (C.A. 4); *National Labor Relations Board* v. *Stocker Mfg. Co.*, 185 F. 2d 451, 454 (C.A. 3).

of Federal district court jurisdiction the employees involved had no other means within their control to protect and enforce the right Congress had given them." Petitioners, on the other hand, seek review of a preliminary action in an unfair labor practice proceeding—an action which, as shown above, can adequately be reviewed under the statutory procedure. Moreover, as the Court emphasized this Term in *Boire* v. *The Greyhound Corp.*, 376 U.S. 473, *Kyne* is further limited to situations in which the Board has contravened a clear and specific statutory requirement. No such situation is presented here. Reading the "unavailability" requirement in Section 5(c) of the APA together with the provision in Section 7(c) that a hearing officer may at any time withdraw from a case "if he deems himself disqualified" (*infra*, p. 10), the Board could reasonably conclude that an examiner who withdraws from a particular case for good cause has become "unavailable" within the meaning of Section 5(c) irrespective of his ability to hear other cases. Indeed, this conclusion is consistent with the uniform application given those sections of the APA by the courts of appeals. *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969, 971 (C.A. 4); *National Labor Relations Board* v. *Stocker Mfg. Co.*, 185 F. 2d 451, 454 (C.A. 3); *Tractor Training Service* v. *F.T.C.*, 227 F. 2d 420, 423 (C.A. 9); *Art National Manufacturers Distributing Co.* v. *F.T.C.*, 298 F. 2d 476 (C.A. 2).

Nor does the decision below conflict with *Deering-Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (C.A. 4). In that case, the Fourth Circuit concluded that the

district court had jurisdiction to compel agency action unreasonably delayed. But, as the court below noted (Pet. 28), petitioners' "complaint neither charges unreasonable delay nor alleges facts from which an inference of unreasonable delay attributable to the Board can be drawn."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1964.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) in addition to those set forth in the petition, are as follows:

> SEC. 10(b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, *et seq.*), in addition to those set forth in the petition, are as follows:

> SEC. 1006. *Hearings; presiding officers; powers and duties.* * * *
>
> In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—
>
> (a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; * * * Any such officer may at any time withdraw if he deems himself disqualified; * * *

SEC. 1009. *Judicial Review of agency action.*

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

The relevant provisions of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, are as follows:

RULES AND REGULATIONS

HEARINGS

SEC. 102.34 (29 C.F.R. 102.34) *Who shall conduct; * * *.*—The hearing for the purpose of taking evidence upon a complaint shall be conducted by a trial examiner designated by the chief trial examiner in Washington, D.C., or the associate chief trial examiner, San Francisco, Calif., as the case may be, unless the Board or any member thereof presides. At any time a trial examiner may be designated to take the place of the trial examiner previously designated to conduct the hearing. * * *

SEC. 102.37 (29 C.F.R. 102.37) *Disqualification of trial examiners.*—A trial examiner may withdraw from a proceeding whenever he deems himself disqualified. * * *